3-1907

The Forum - Volume 11, Issue 6

THE FORUM.

VOL. XI. MARCH, 1907. NO. 6

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THE RIGHT OF SURFACE SUPPORT.

Noonan v. Pardee, 200 Pa. 474.

Whether viewed from the standpoint of the practical importance of the questions involved, or viewed simply as an example of curious judicial logic, Noonan v. Pardee is a striking decision.

The facts were these. On April 22nd, 1890, Noonan purchased a lot in Hazleton and built a house upon it. On January 11th, 1892, while he occupied the house, the ground under it and in the neighborhood subsided, leaving a saucer-like depression, about three feet deep in the middle and extending over about two acres. The Lehigh Valley Railroad Company at one time had owned both the surface and the underlying minerals. In 1869 the railroad sold the surface to one through whom the plaintiff derived his title. The title to the underlying minerals, however, was expressly reserved, but instead of stipulating against liability for injuries to the surface caused by mining, as it might well have done,[1] the railroad expressly agreed that the common law duty to support the surface should be observed. It was not disputed that the subsidence was the result of the mining of the underlying coal, but it was denied that mining had been done *by the defendants immediately beneath* the lot of the plaintiff, and it was also denied that there had been any mining done directly beneath the plaintiff's lot *within six years*. To recover for the serious damage to his house and lot Noonan brought an action of trespass. The defendant was the lessee of the mine at the time of the subsidence and had been the lessee from 1874 up to that time. The

[1]For important cases on this point see Madden v. Lehigh Valley Coal Company, 212 Pa. 63 and Niles v. Pa. Coal Co., 214 Pa. 544. They hold that the purchaser of the minerals may protect himself from liability even for negligent mining, by such a stipulation in his deed.

plaintiff founded his action upon an alleged removal of coal subsequent to the date of his purchase in 1890, and he also alleged that the injurious mining had been done directly beneath his lot. His suit was begun in 1894.

Nearly all the questions involved in the case turn upon the decision of the question whether the owner of the surface is wronged, in legal contemplation, from the date when the owner of the subjacent minerals removes the minerals, without leaving sufficient supports for the surface, or whether the tort dates only from the date when the subsidence of the surface occurs.

The nature of the right of the surface owner to the support of his land by the owner of subjacent minerals, has been differently regarded by different judges. Some have regarded the surface owner as possessing an easement over the subjacent estate. "The owner of a mineral estate, if the law be not controlled by the conveyance, owes a *servitude* to the superincumbent estate, of sufficient support." Jones vs. Wagner, 66 Pa. 429.[1] Now "a servitude is a right whereby one thing is subject to another thing or person for use or convenience, contrary to the common right." "Servitude" is simply the name applied to the burden imposed on an estate by virtue of an easement possessed by another, Webster's International Dictionary, page 1316. Cyclopedic Law Dictionary, page 842. The better view seems to be that the right is simply that which every property owner possesses, to enjoy his property without disturbance. Under this view, the subsidence is an interference with this enjoyment just as is a trespass *quare clausum fregit* or a neighboring nuisance.

If one may sue at once upon the discovery of an imprudent excavation by the subjacent owner, if a tort is committed as soon as a subsidence seems likely to occur, and if in such action he is permitted to recover all the damages he will suffer when the "cave in" occurs, then the right to sue should be regarded as barred after six years from the date of such excavation. But if there is no right of action till the date of the subsidence, then

[1]See also Robertson v. Coal Co. 172 Pa. 566; Williams v. Hay, 120 Pa. 459; and Penn. Gas Coal Co. v. Versailles Gas Co,. 131 Pa. 522, especially paragraphs 2 and 3 in the syllabus. On the other hand in Youghiogheny Co. v. Allegheny Bank, 211 Pa. 319, it is said: "The owner of the surface is entitled to absolute support of his land, *not as an easement* or right de pending on a supposed grant, but as a proprietary right at common law: Carlin v. Chappel, 101 Pa. 348." See the same effect, Niles v. Penna. Coal Co.. 214 Pa. 547.

the surface owner should have six years from that date in which to recover his damages. That no tort is committed until the subsidence, is made very clear by an illustration given by Byles, J., in Bonomi v. Backhouse, 1 E. B. & E. 620. He says: "Take the case of a man allowing trees to be on his land, which if they are allowed to grow for a certain time will injure the land of his neighbor; can the neighbor maintain an action as soon as an acorn is put in, and before the trees have grown so as to be injurious?" In the same way the artificial props used in the mine may be adequate when first put in and so be as harmless as the acorn, but they decay and grow dangerous with the lapse of time. If the injurious trees are cut down before they do injury, no tort is committed. So if the timbers are renewed. There is no more of a tort when the mining ceases than when the acorn is planted.

Let us see how our Supreme Court, speaking through Justice Dean, answers this question. On page 482 we read: "If the mining which caused the subsidence was more than six years before suit brought, and the injury occurred within six years, even though the miner or operator was still in possession, he is not answerable in damages, *for there is no right of action for damages until the damage occurs.*" It would seem that "notwithstanding" would have been a more appropriate conjunction than "for." To say that the right of action dates from the subsidence, and so conclude that the statute of limitations begins to run, not from that date, but from the date of the mining, is a trifle puzzling.

Immediately following the sentence quoted we read as follows: "The first question raised by the assignments of error, is, what was *the date of the causes of action*? *A cause of action is that which produces or affects the results complained of.*" We thus discover that the "*cause of action*" is a different thing from the "*right of action.*" The "*cause of action*" dates from the act of mining, since that is what "produces the results complained of." The "*right of action*" does not exist "until the damage occurs."

[1]Note that "artificial" props are lawful, if "sufficient." This is recognized also in dicta in Kistler v. Thompson, 158 Pa. 139 and in Gumbert v. Kilgore, 6 Cent. Rep. 306, 6 Atl 771, 4 Sad. 84. It is also lawful in the case of lateral support; Wier's App. 81* 203. But in Robertson v. Coal Co. 172 Pa. 173 it is said: "The owner of the mine must leave *enough of the mineral* in place to answer the purposes of support for the surface unless the owner of the surface has released his right to support."

On page 483 we read as follows: "The adjacent owner in this case, at some time *failed in duty* to the owner of the surface of this lot. The mere fact that it caved in because the coal had been mined underneath, demonstrates this failure. *When the coal was removed* without supplying sufficient pillars, or without supplying *sufficient artificial*[1] *props*, was the time when the subjacent owner failed in an absolute duty he owed to his neighbor above. And *from that, dates the cause of action.*" And on page 484 it is said: "In this case, the *right of action arose when the mine operator failed to furnish sufficient support;* that may have been more than six years before said suit brought, or it may not; it may have been partly due to mining before and partly to mining afterwards, in which latter case, the action would not be barred; if wholly due to the removal of coal six years before suit brought and failure then to leave sufficient support, the action would be barred. The *date of the "cave-in"* and partial destruction of the house, is *not the date of the cause of action, that* (i. e. the cave-in) was *only the consequence of a previous cause*, whether one month or twenty years before." These expressions indicate that the court uses the expression "cause of action" as synonmous with "cause of the cave in." For, it seems, the date of the one is regarded as settling the date of the others. This confusion appears also in this statement: "The *right to sue* passes to the surface owner who is in possession *when the subsidence occurs*, without regard to the date of the conveyance; this right is barred by the statute of limitations if the *cause of the subsidence arose* more than six six years before suit brought." On page 123 of the Cyclopedic Law Dictionary we read: A *cause of action* is said to accrue to any person when that person first comes to a *right to bring an action.* It is synonymous with "right of action." [We will have to revise our law dictionaries.]

The court's first statement, that "there is no *right of action* for damages until the damage occurs," seems to be in direct contradiction of the later statement, that "the *right of action* arose when the mine operator failed to furnish sufficient support." Since, however, the statement is reiterated that the "*cause of action*" dates from the removal of the coal, we are about to conclude that this is what the court really means, when we are met by this illuminating statement: "If the cause of injury was within six years, although at the date of the deed (i. e. the conveyance to the plaintiff) the damage was not susceptible of computation, yet afterwards became so by the

subsidence of the surface, their *right to sue* was *then fixed*, (evidently at the date of the subsidence,) a *right, which, from the nature of the case, could not have had more than a doubtful existence before the actual damage occurred.*" And a little further on we read this: "*When the right to sufficient support has been violated, the cause of action*, it is true, *arises*, but the owner in possession when the consequences follow is the one who suffers. There may, in the interval, have been several owners, none of whom sustained damage except the last; *he alone has the right to sue*, because to him only has passed the right to enforce by suit the collection of a damage occurring during his possession."[1] What an anomalous situation! We have here the clear statement that though the "*cause of action*" arises when the mining is done, yet the "*right to sue*" does not accrue, perhaps, till twenty years later and to another man. In the meantime the statute of limitations has been running and by the time the right to sue arrives, the unfortunate owner of the surface discovers that the statute has anticipated him by many years and that he cannot sue at all. The right to sue during the period intervening between the date of the excavation and the date of the subsidence is in what the court terms a state of "doubtful existence," a condition so nebulous and dubious that no court of law may hear the suitor's complaint; and yet, thinks the court, the time has arrived when the statute of limitations should be started on its destructive run.

Lest the reader feel that this savors of injustice, he is informed by the court that the surface owner has a right of access to the mine, to see that his right of support is being observed. But suppose he visits the mine, and sees provision made for the support of the surface which seems to him quite inadequate. Still he has no right of action. The operator can safely

[1] In Hill v. Pardee, 143 Pa 98, the question arose. Judge Rice in the court below held that the right of action did not accrue until the injury to the surface took place, and, "therefore, their could have been no right of action in anybody until this date; and then the right of action was in the person to whom the duty of support to the surface was owing." The lower court was reversed on appeal but Justice Mitchell, who wrote the opinion, saw a chance to decide the case on the point of misjoinder of parties, and so dodged the burden of deciding this important point. He sent the case back without any criticism of Judge Rice's views. Noonan v. Pardee informs us that though the right of action accrues when the mining is done, yet that it is the owner at the time when the subsidence occurs who is the only one who can sue.

reply, "My duty is simply to have 'sufficient' supports. Your surface is still intact. The 'result demonstrates' that the supports are sufficient." So the surface owner, who must now live in a house which is in imminent danger of collapsing on his head at any moment, goes back from his tour of inspection to await a "cave-in." And, if he is aware of his legal rights, he will earnestly pray that it come quickly, for if the operator has put in props which successfully support the surface for six years, little need the operator care what happens after that. A wooden post will not decay in six years, why then leave pillars of coal or columns of concrete? "The surface owner should make constant tours of inspection," we are to told. But to what end? To destroy his peace of mind, perhaps! They serve no other purpose. He resolves to sell and move away, and what is the result. The buyer has been in the mine too, perhaps, and knows the methods used and the resultant danger to the surface. Will he pay a full price? Hardly. The seller cannot sue and recover for this depreciation in the value of his property. His only plan is to sell the chance of a law suit to his buyer. And this we are told, he can do, and for this he may get something. The buyer can sue, if only the cave-in follows within six years after the mining. Though the wrongful act is past when he buys, yet he may possibly catch the right to sue in the next year or two, and for this chance he may pay something. If he were sure to recover when the "cave-in" should occur, he would pay full value and this is what the old owner should have. "But," says the Court, "we hold that the miner is not forever answerable for even his own default; further, in no case is he answerable for the default of his predecessor before his possession. Neither equity nor law demands, that any greater burden should be placed upon him than that indicated; any heavier one would encourage the purchase of surface over coal mines for *speculation in future law suits.*" To call the purchase of a house, with the right to have it remain as it is at the time of purchase, a speculation in future law suits, seems uncalled for. A buyer of a horse incidentally buys the right to sue one who interferes with his possession, but this does not make his purchase a speculation in law suits. The fact that the mining has preceded the purchase of the land should not affect the case, for in view of the case taken by the court: "*Until the damage actually occur, no one can tell when they will occur, or that they ever will.* Each grantee has the *right to presume,* that the adjacent owner has performed his legal duty, and the

price, while *probably somewhat depreciated by the possible risk*, is not fixed on a presumption, that his land will subside because of any special failure in duty on the part of him who has taken out the coal." Since in the event of a subsidence the then owner could only recover the amount of his actual damages, it is hard to see wherein lies this danger of "speculation in law suits." Compensation is not speculation.

If the court really means that the cause of action accrues when the mining ends, as is repeatedly asserted, and if the owner at that date may sue and recover his prospective damages; since the court holds that a later owner in possession when the subsidence occurs, also has a right of action, because "he is the one who suffers," then it follows that the operator may be subjected to two suits for the same tort. He must pay double the amount of the damage done.

We note that "*the grantee has the right to presume that the subjacent owner has performed his legal duty.*" On page 484 the court also says, in speaking of a subterranean trespass and removal of coal by one entering from a laterally adjacent mine: "He (the one trespassed upon) had no reason to suspect or presume, that one who had no claim of right would wrongfully enter on his land and dig his coal." It would seem to follow likewise, that the surface owner has no reason to presume that the subjacent owner is not inserting the necessary supports, until a subsidence notifies him to the contrary. The court held on the contrary, however, that the surface owner is bound to suspect wrong doing of this character and inspect the mines. Why the surface owner should be expected to be so much more suspicious than his grantee is expected to be is difficult to apprehend. And why one must be on the watch for pillar-robbing and not for coal stealing is equally puzzling.

As before stated Noonan had alleged in his statement that the wrongful mining had been done within the four years of his ownership, evidently supposing that he could not recover for improper mining done before he acquired his title. His chances of recovery were thus considerably limited by this defect in his pleading. He should simply have alleged a removal of coal within six years before the date of his action.

On page 482 it is said: "The right of support is an absolute right arising out of the ownership of the surface. *Good or bad mining in no way affects the responsibility*; what the surface owner has a right to demand is *sufficient support*, even, if to that

end, it be necessary to leave every pound of coal untouched under his land. * * * Of course defendant had a right to all the coal under this lot, but, he had no right to take any of it, if thereby necessarily, the surface caved in. The measure of his enjoyment of his right must be determined by the measure of his absolute duty to the owner of the surface. So, *there is nothing gained by adducing evidence of good or bad mining*, or by a discussion of that subject." (Compare quotations on page 132, post.)

It is clear then that the test of of one's liability is simply, "Does he sustain the surface or does he not?" If he does, he has done no wrong, though he has taken out every pound of coal. If he does not, he is liable, though he made the most elaborate efforts to sustain the surface. Good or bad mining is not the question. As has been well said:[1] The right of support means strictly what the words import; a right to *support.* If support is not afforded, the right thereto is violated. However if the cause of action dates from the time at which the mine supports are rendered so insufficient that a subsidence *might possibly occur*, it seems apparent that the so called "right of support" is nothing more than *a right against a possibility or probability of a failure to support.* A right to support is a right to have the surface land supported. It is not a right (simply) to have the subjacent owner furnish those means of support, which a dozen of experts deem to be *adequate, in all probability* to support the surface land." Nor can one sue simply because a dozen experts say the supports are *probably insufficient.* What absurdity then to require the surface owner to enter and inspect the mines and to decide whether the mining is "good or bad" and particularly the date when the removal of coal becomes excessive.

If there can be a palpable wrong before the subsidence, if the inspection required of the surface owners could disclose to him the existence of a completed wrong, then, under the authority of Turnpike Company v. Brosi. 22 Pa. 32, (discussed in Noonan v. Pardee) the right of action would adhere to the then owner, instead of passing to a later buyer, as the court holds it does. "The vendee will pay less for his estate on account of the injury, and has, therefore, no claim to recover damages for it." This doctrine of Turnpike Company vs. Brosi, "that the purchasers of an estate cannot claim damages for an injury done to

[1] 50 Am. L. Reg. Old Ser. 244.

it before its purchase," was held to be inapplicable to such cases as Noonan v. Pardee, because, said Justice Dean, the failure to leave supports was such an "impalpable" injury that a buyer would pay as much after as before the wrongful act. Yet in the next breath we are told that it is fair to start the running of the statute of limitations from the date of the excavation, because the surface owner has a right to enter and inspect the mines. How the surface owner can discover that he has been wronged, if the wrong is so impalpable that a prospective purchaser cannot discover it, is hard to see. Surely no man will buy surface land over coal mines without first inspecting the mines, for when the subsidence occurs, he may find his right of action is barred by the statute. "Caveat emptor" would certainly lead to the discovery of the danger, and a consequent reduction in the price bid, if it were capable of discovery. To say then that the buyer will not pay less, because he can't discover the wrong, is to say that the wrong is not discoverable.

In Gas & Water Co. v. Iron & Coal Co., 167 Pa. 152, Justice Williams said: "What an owner might know if he were personally present, * * * he is bound to know, unless his attention is diverted by the fraudulent artifices of the wrongdoers. The question in any given case is not, what did the plaintiff know of the injury done him, but what might he have known by the use of information within his reach with the vigilance the law requires of him? * * * *When knowledge is impossible because of the laws of nature*, * * * *the statute runs from the time of discovery*.[9]" Now, if the wrong is "impalpable," as the court says, before the subsidence, then we have in Noonan v. Pardee the precise situation defined by Justice Williams. Knowledge is impossible because of the laws of nature. Until man acquires prophetic foresight, no one can tell whether the removal of any pound of coal is lawful or a tort. It all depends on the result. The surface owner is thus compelled at his peril to do what is inherently impossible. And if he should be so presumptuous as to predict calamity and attempt to recover his prospective damages before they occur, he is again confronted with the information that he has no business to sue, for he may not be the owner when the calamity happens. Whether he sues or not his defeat is equally certain. If he tries to sue he is told there is no right of action till the "cave-in." If he sues then, he is told that his right has been barred by the statute. What a dilemma!

Lewey v. Frick Coke Company, 166 Pa. 536, in holding that

the statute does not run against the right to sue for a subterranean taking of one's coal, till the surface owner discovers the taking, can be sustained only on the ground that equity will not allow the statute of limitations to operate as a bar to one's suit, before he has reasonable means of discovering his cause of action. The other reason given that the failure to disclose the trespass is "*fraud*," is indefensible either on principle or authority.[1] Noonan v. Pardee is not analagous, thinks Justice Dean, because this element of so-called "fraud" is lacking. One may not enter the mine under one's neighbor's land to see whether it is being wrongfully extended under one's own land. He thus must remain ignorant of the trespass till he sinks a shaft or the wrong does informs him. This is said to be the trespasser's duty, and the non-performance of it is called "fraud." On the other hand, says Justice Dean, since the surface owner may visit the mine vertically beneath him, there is no fraud in the operator's failure to inform him of a failure to leave sufficient support. The learned Justice entirely ignores the fact that the one tort is complete as soon as the line of division is crossed by the trespasser. It is then capable of discovery by sinking a shaft and an action lies at once. The burden of a rule requiring one to sink shafts to watch his coal is the only reason why the statute does not begin to run. But in Noonan vs. Pardee the tort is not only undiscoverable by any earthly means, but as a matter of fact, it does not exist until the subsidence has occurred. As in the tort of negligence, the want of care is no tort unless it results in injury, so the mining is necessarily lawful until the "cave-in." In Lewey v. Fricke Coke Co., supra. at page 542, Justice Williams says: "It is easy to see that the mischief which the statute was intended to remedy was delay in the assertion of a legal right *which it was practicable to assert.* The remedy provided was a denial of process to one who had slumbered for six years *during which process was within his reach.*" How absurd then to start the statute from the date of the mining.[2]

[1]Dawes v. Bagnall, 23 W. R. 690 and 9 Harvard Law Rev. 147.

[2]Ardemus Stewart, Esq., in his recent excellent edition of Purdon's Digest at page 1287, after stating the ruling in Noonan v. Pardee, continues: "The only justification that the court put forward for this ruling was that the surface owner had the right of access to the mines to see that his right of support was observed. Now, in the first place, experience has demonstrated that that right can be secured only by long and expensive legal proceedings, when secured, the surface owner cannot tell whether sufficient supports are left, without securing

What the Supreme Court will do when the question arises as to the time when the statute shall begin to run in a case where a "cave-in" results from mining beneath the surface of an *adjoining* lot, affords an interesting subject for speculation. Since the man injured could not have visited such a mine, perhaps the rule of Lewey v. Frick Coke Company will be applied. But since the inspection is useless in both cases, any such distinction would emphasize the absurdity of the rule of Noonan v. Pardee.

"It is argued," says Justice Dean, "that *in some cases*, the surface owner could not know by the most careful observation whether the main owner had *neglected his duty* within six years." (This would suggest that it is not enough to prove the fact of mining within six years, for this is a fact that observation will disclose. It is the task of predicting whether the supports provided from day to day will prove adequate or not in later years, that is truly superhuman and incapable of performance even with the "most careful observation.") "We answer," says the court, "that that is only one of the incidents attending the purchase of land over coal mines; it is not improbable, that this risk enters largely into the commercial value of all like surface land in that region." We cannot help but wonder what commercial value surface lands can have after the depreciation due to such a decision as this one.

That a plaintiff, in order to recover, must in fact show, not only that there has been mining within six years, but that he must show also that this recent mining was to blame (i. e. that it was bad mining) is borne out by this statement of the court: "Even if the main body of the coal under plaintiff's land has been mined out more than six years before suit brought, yet, if defendant has done additional mining by removal of coal left in previous work, or by robbing of pillars within six years before suit, *and without such additional mining the surface could not*

expensive expert assistance; and even if he should go to all this expense, which most surface owners are financially unable to incur, then if he should bring suit to prevent the running of the statute, unless the surface had already subsided, he would be met with the plea that no actual damage had occurred and plenty of expert evidence on the other side to the effect that none ever would occur; and the court would gently turn him out with *damnum absque injuria*, so that these fancied rights of the surface owner are a mere figment of the imagination, and this decision leaves him remediless. It is worthy only of a place beside the notorious Sanderson Case, in which, as was said by one of the greatest lawyers this state ever produced, the court held a pump to be a natural water course."

have subsided during plaintiff's occupancy, yet[1] *if such additional work or mining hastened the result,* the defendant is answerable in damages therefor."

To be consistent with the rest of the opinion, the words printed in italics should have been omitted. If the statute runs from the date of the mining, inasmuch as no man can tell which pound of coal it was, the removal of which was to blame for the subsidence, the right to sue surely continues for six years from *date of the last mining.* Under the rule as laid down, the jury must investigate when the mining was done which caused the "cave-in." If the late mining was carefully done, and the early mining was carelessly done, so that it could be said that the late mining did not "hasten" the result, then, it is held, one cannot recover unless the suit is within six years from the date of the early mining.

How the jury can decide the other question, namely: whether or not "without such *additional* mining the surface would have subsided *during the plaintiff's occupancy*" is very hard to see. We have authority for supposing that it is the "last straw that breaks the camel's back." But we are told that this must be proved as a fact in case of mining. The expression "during the plaintiff's occupancy" is only intelligible in case the plaintiff is a mere lessee of the surface. In the case of any other plaintiff than a lessee for years, the jury cannot tell what will be the duration of his "occupancy." But granting that the plaintiff is one with but a leasehold interest, is it possible for a jury to determine when the subsidence would have occurred in the absence of the late mining? Justice Dean had just told us that no one can tell whether a subsidence will ever occur until it happens. It all depends upon the geologic formation of the strata of rock between the coal stratum and the surface. The logical conclusion is that the more careless the early mining the more secure is the position of the coal company, for it can then plausibly say: "The 'cave-in' was sure to have occurred anyhow, regardless of our late mining, and since our bad mining was done more than six years ago, we are immune." Unless the poor surface owner can prove the contrary and unless he can go further, and prove that the surface would have remained intact during the balance of his term but for the late mining, he is remediless.

[1]Instead of "yet," Justice Dean evidently meant "or in other words." "Yet" makes the sentence meaningless.

Having now found when the right to sue exists in Pennsylvania, let us see what damages the surface owners may recover in case he is lucky enough to have the subsidence occur within six years of the date of mining which he can show hastened the "cave-in."

First, it is to be noted that it was a disputed fact in Noonan v. Pardee, whether the mining which caused the "cave-in," was that which had been done directly beneath Noonan's lot or whether the mining which was to blame was that which had been done under other lots adjoining his. The plaintiff in his statement had laid the blame on the mining directly beneath his lot. The lower court, evidently apprehending the physical difficulty of determining such a question, when the whole neighborhood had been undermined and had subsided at the same time, had charged the jury that Noonan could recover in either event, for the defendant was operating the mines under all the lots. This direction, it was held on appeal, was clear error, for, "when we consider, that there is not an intimation in the statement, that any such cause of action ever had an existence, it is somewhat difficult to conceive how it could have been adopted as one of the grounds of recovery." The chances of Noonan's recovery were thus very much limited again by a defect in his pleading. For, though it was held that to fail to support laterally is a distinct tort from the failure to support vertically, yet an injury may well result from the concurrent operation of both. Noonan, therefore, should simply have alleged that his injury was due to one cause or the other or both. The burden is then placed upon the jury of decidingwhich mining was to blame. The fact that this is impossible to decide, inasmuch as the whole neighborhood covering several acres subsided simultaneously, does not relieve the jury of this burden. Before the plaintiff can recover, this question must be settled, for, says the court, "Damage for failure to furnish vertical support to the surface in mining underneath, is a well-known cause of injury to the surface owners; but that an adjacent owner has not; by removing lateral support, caused a vertical subsidence of the surface, is an altogether different averment of the ground of complaint. He may be the same, or some other than the operator of the mine underneath. *His duty is not in all respects the same; the rule for the computation of damages is not the same.*" It thus appears that upon the decision of this vital question as to which mining was to blame, may turn the

decision as to whether the surface owners shall get ten dollars damages, or ten thousand dollars or nothing at all.

The rules governing lateral support were adopted in controversies between adjoining surface owners, usually where a man dug his cellar after his neighbor had built a house close to the line. Public policy demands that the first builder should lay his foundations so securely, that his neighbor may be able later to excavate for his house up to the line without overthrowing the first builder's house. Any other rule would seriously limit the later builder in the use of his lot.

It is important now to observe that the court decides these rules to be applicable to subterranean mining, wherever the surface affected by such mining is not located directly above the mine that caused the injury. The fact that the subsidence is vertical and not lateral is held to be immaterial. The fact that the reasons assigned for the rules, when they were adopted, have no application to cases of subterranean mining is disregarded. The duty of the mine operator is held to be no greater than that of the cellar-digger, unless the surface injured is directly above his mine.[1]

[1]In Neatulys v. Coal & Iron Co., 201 Pa. 70, the defendant had removed the support from under one end of a large rock at a point some distance from the plaintiff's land. The rock was so pivoted that upon the subsidence of this end, the other end, which extended under the plaintiff's house, was elevated and the plaintiff's house was *lifted* and injured. For this *excess of support* it was held that the defendant's liability was to be controlled by the rules governing the duty of lateral support, that is, no recovery could be had for the injury to the house.

To be continued.

JOSEPH P. McEEHAN,

MOOT COURT.

SLOANE VS. KISSLER.

Decedent's Estate—Interest, after-born child- Practice—Remedy of Creditor.

STATEMENT OF THE CASE.

Wm. Sloane died, devising land to his widow. After his death a daughter, Harriet, was born. A creditor sued the widow as administratrix and devisee, and obtained judgment for $500, on which an execution issued, and a sale of the land took place for $4,000. After the debt was paid and interest and costs, $3,200 was paid over to the widow as devisee. Harriet now brings ejectment against Kisler, the purchaser at the sheriff's sale.

Rodriquez for the plaintiff.

Plaintiff took the fee to the land. Act of April 8, 1833, P. & L. Dig. of Laws, Col. 1450, Walker v. Hall, 34 Pa. 483. Sheriff's sale did not divest plaintiff's title. McCracken v. Roberts, 19 Pa. 390; Morton v. Weaver, 99 Pa. 47. In suit by creditor against the administrator, was necessary that plaintiff as heir, should have been party to the suit. McCracken v. Roberts, supra; Sample v. Barr, 25 Pa, 457.

Hatz for the defendant.

A sale is not ipso facto void, though the heirs are not joined in suit with administrator. Leiper v. Thompson, 60 Pa. 177. Execution issued upon a judgment is not absolutely void, and sale of land upon such execution vests in purchaser a good title. Spear v. Sample, 4 Watts 376.

MISS O'DEA, J.—According to the Act of April 8th, 1833, it is a well settled fact that children, born after the death of their father, shall be entitled to such purparts, shares and dividends of the estate as they would be entitled to, had such father died intestate, and that as to them such father shall be regarded as having died intestate. This is the doctrine of Walker v. Hall, 34 Pa. 483, which case is regarded as authority upon this doctrine. This case holds it to be a positive statutory enactment and one which parol testimony outside of a will or any language in a will cannot defeat on the presumption that decedent did not intend to provide for such after born child.

The doctrine of Levan vs. Mulholland, 114 Pa. 49, does not hold in this case. The heir will not be estopped from setting up her title on account of failure to make known her claim.

Action against the estates of decedents, where there are children of decedent living who take under intestate law, should be brought against the widow and heirs, and guardian of such heirs as are minors. This action was against the widow as sole devisee and is not good or binding.—P. & L.,

Act 1834, Col. 1496; McCracken v. Roberts, 19 Pa. 390; Sample v. Barr, 25 Pa. 457.

And it is also well settled that when the real estate of a deceased person is sold at Sheriff's sale, such sale does not divest the title of the children, if the sale is conducted on a judgment obtained against the administrator of the estate. Authorities for this are McCracken v. Roberts. supra, and Norton v. Weaver, 90 Pa. 47.

Replying upon such well founded principles where the law is so plainly evident, judgment should be given for plaintiff.

Judgment for plaintiff.

OPINION OF THE SUPREME COURT.

The testator must be regarded as having died intestate, as to his daughter Harriet. It follows that, upon his death, the land descended to her, subject to his widow's dower. The judgment against the widow, as administratrix, could not be enforced against Harriet's interest in the land, until a judgment upon it against her guardian was obtained. The sheriff's sale has passed only the widow's right.

Although Gourey v. Kinley, 66 Pa. 370, holds that an heir cannot expel a widow from the land by ejectment, until he causes the dower to be assigned, it was held in Taylor v. Birmingham, 29 Pa. 306, that the widow's alience cannot defend his possession by virtue of her right of dower. We are not to regard this decision as overruled by the later case; although it is difficult to justify their consistency.

The judgment is therefore confirmed.

SNOKE VS. AMOS.

Joint and Several Note—"Security"—Extension of Time—Agreement to Release—Payment of Interest Consideration for Extension.

STATEMENT OF THE CASE.

Amos as security, executed with Tappan a joint and several note for $4,000.00, to Snoke payable four months after date. It became due April 3rd, 1905. On April 27th, 1905, Tappan paid $240.00 to Snoke, as interest, the note remaining unpaid. Assumpsit is brought Aug. 11, 1906, against Amos.

Coke for the plaintiff.

Nothing short of an agreement to give time which binds the creditor and prevents his bringing suit, will discharge the surety: Bank v. Marshall, 9 Super. ct. 621; Calvert v. Good, 95 Pa. 65; Grayson's Appeal, 108 Pa. 581.

Pierce for the defendant.

Payment of interest in advance will be presumed to be an extension if made after maturity for interest not accrued: Siebeneck v. Anchor Savings Bank, 111 Pa. 187; Hartman v. Danner, 74 Pa. 36.

OPINION OF THE COURT.

KLEEMANN, J.—The note in question was executed on the 3rd of December, 1904, and fell due four months later, April 3rd, 1905. Twenty-four days after the maturity of the note, Tappan paid to Snoke $240.00 as interest. This amount, computing interest at the legal rate of six per cent., covered the interest for one year in advance.

It has been held that when the holder of a bill or note grants an extension for a definite time to the principal without the surety's consent, by a valid agreement based on a valuable consideration, he will thereby discharge the surety. 2 Randolph on Commercial Paper, p. 638, cited with approval in Bishop's Estate, 195, Pa. 90. Was there an agreement in the present case to extend the time? De Colyars in his Law of Guarantees, Principal and Surety, p. 294, says, "An agreement to give time need not be made in express words in order to have the effect of discharging the surety. If an agreement in effect be a giving of time by an implied agreement, it will operate to relieve the suretyship." It is quite obvious that here was an implied agreement by the acceptance of interest in advance by which the time of payment of the note was extended, and this being done without the knowledge or assent of the defendant, who was surety, his rights were thereby affected. In the absence of all proof to the contrary, it cannot be supposed here that the drawer, when the note had become payable, could have had any other motive for paying the interest for a year in advance than that of procuring indulgence for that space of time from the holder. That such, too, must have been the understanding of them both at the time seems to be the necessary inference from the facts stated, if our judgments are to be guided in this respect by what we know to be common and ordinary motives which generally influence and produce such arrangements.

Payment of interest in advance is the strongest circumstance showing a renewed credit. In Siebeneck vs. Anchor Savings Bank, 111 Pa. 187, the court said that "the payment of interest in advance will be presumed to be an extension of time if made after maturity for interest not accrued."

To make the agreement binding a consideration was necessary. Payment of interest in advance would be such a consideration as would make it the duty of the creditor to abstain from suit during that period: Grayson's Appeal, 108 Pa. 581; Siebeneck v. Anchor Savings Bank, supra; Calvert v. Good, 95 Pa. 65.

The right of the holder to proceed against the drawer, to enforce the payment of the note by suit, was suspended until after the expiration of the year. The acceptance of interest in advance was in effect changing, without the consent of the defendant, the terms upon which he had agreed as surety to become liable for the payment of the note, and therefore amounted to a release of him from his liability.

Judgment for deft.

OPINION OF THE SUPREME COURT.

The note of Tappan and Amos was joint and several. Amos was in fact the "security." It does not appear however, that Snoke was aware of this relation. He had reason from the form of the note to suppose him a co-principal. The extension to Tappan of the time of payment, could not release Amos. "A surety is not discharged by an extension, unless the creditor knows, actually or constructively, at the time the relation of suretyship is formed, or learns subsequently [before the extension] that the surety is a surety and not a co-principal". 27 Am. and Eng. Encyc. 505.

We are unable to discover a binding agreement between Snoke and Tappan for the extension of the time of payment. Tappan paid $240.00 as interest. Was this usurious interest for the time between April 3rd and April 27th? If so, it would need to be treated as a partial payment of the principal, and a partial payment of the principal is not a consideration for an extension of time.

Was the $240.00 paid to secure a delay for the period the interest for which, at 10 per cent., or at 9 per cent., or at 8 per cent., or at 7 per cent., or at 6 per cent, would amount to so much? We may guess that it was for the last, but we cannot know. We cannot say that there is any palpable presumption that it was for the last.

It does not appear that there was any express agreement to give time at all, or to give a definite time. We may imagine that in receiving the $240.00 as interest Snoke intended Tappan to understand that he was giving him so much more time as that money was the interest for at six per cent. but we do not know that he did.

In Hartman v. Danner, 74 Pa. 36, the principal, at the maturity of the note, paid interest at six per cent. for an additional year, on an agreement for that extension. He also gave a due bill for two additional per cents. which was subsequently paid. Because the percentage above six being unlawful might be treated as applicable to the reduction of the principal, the court for some occult reason, concluded that even the payment in advance of the interest at six per cent. furnished no consideration for the agreement

to extend. The case was followed in Dushane v. Allen, 2 Walk. 348, and in Calvert v. Good, 95 Pa. 65. Without apparent consciousness of the inconsistency of these decisions with Grayson's Appeal, 108 Pa. 581, where the principal, after the maturity of the note paid interest for one month's further time, at 9 per cent., the court held that the interest in excess of 6 per cent. was to be treated as paid upon the principal, and that the payment of the six per cent. interest was a sufficient consideration for the extension of the time. The surety was therefore discharged. This is probably the more sensible view—as it is the later. We cannot apply it to the case before us, because it does not sufficiently appear that there was an agreement to give time. In Siebeneck v. Anchor Savings Bank, 111 Pa. 187, there were shown express agreements for definite extensions. We do not find as the learned court below did, that this case is authority for the principle that "the payment of interest in advance will be presumed to be an extension of time if made after maturity for interest not accrued".

Judgment reversed with v. f. d. n.

WM. HARPER VS. JOHN WHERRY,

Liens on Land of Decedent—Renewal of Lease by Heirs—Ejectment.

STATEMENT OF THE CASE.

Amos Troop died owning land, and owing debts which exceeded by $2,000 all his personal estate. When he died Wherry's land was in possession of his tenant. His heirs renewed the lease for five years. The administrator 1½ years after Troop's death obtained an order from the Orphans' Court for the sale of the land. The sale was made to Harper. This is ejectment to recover possession. Six months' rent had been paid on the current lease by Wherry, two weeks before the sale. The next instalment of rent he tendered to Harper who refused to receive it.

Lindley for the plaintiff.

No debts of a decedent, except they are secured by mortgage or judgment, shall remain a lien on the real estate longer than two years after the decease of such debtor: Act of 1893, P. & L. Digest, Col. 1434. If the sale was on a lien which already existed when the lease was made, the right of the purchaser at the sheriff's sale is superior to that of the tenant: Garrett v. Dewalt, 43 Pa. 343; Stockton's Appeal, 64 Pa. 58; Walbridge's Appeal, 95 Pa. 566. The purchaser at the judicial sale has the option to affirm or disaffirm the lease: Trickett, Landlord and Tenant, p. 528.

Reed for the defendant.

The heirs having a fee simple estate, had the power to make a valid and binding lease; 18 A. & E. 607. It is a fundamental principle of the law of landlord and tenant that notice is necessary to terminate a lease. Notice was necessary in this case because the tenant had absolute title to the property under the lease.

OPINION OF THE COURT.

THOMPSON, J.—In this case the personalty of the decedent was not sufficient to pay his debts; so that it was necessary for the administrator to secure an order from the Orphans' Court authorizing him to sell the real estate so that the $2,000 worth of debts that were not covered by the personality, might be paid. This he did one and one half years after the death of Troop, and the lands were sold to Harper, the plaintiff in the case But before the lands were sold by the administrator, Troop's heirs had renewed the lease to John Wherry, the tenant of the lands sold.

This state of facts raises the question as to whether the debts were a lien on the land at the time the lease was renewed, and also the other question as to whether the lien was still in effect at the time of the Orphans' Court sale. On both these questions we do not think that there can be any serious controversy, as through a series of acts, beginning with that of 1794 and ending with that of June 14th, 1901, the debts of the decedent have been made a lien on the real estate of which he died seized; the difference in the various acts being as to the time—the latter act restricting the limit of the

lien to two years from the time of the death of the decedent.

Sales under an order of the Orphans' Court are not the acts of the decedent or of his heirs or devisees: they are the act of the Court, and they require no consent of the owners; Greenough v. Small et al., 26 Pa., 567 And the Act of March 9, 1849, provides that a purchaser at an Orphans' Court sale shall have the right to obtain possession of the premises by proceedings in the same manner as provided in relation to sheriff's sales. And a sheriff's deed would be sufficient ground, if properly acknowledged, to recover in an action of ejectment.

Under the procedure of the Act of 1834, Feb. 25, section 20, which is the section that gives administrators and executors the right to sell the estate of the decedent to pay his debts, it is not necessary to give the heirs notice of the proceeding. Wall's Appeal, 31 Pa, 62.

Because of the reasons given we do not entertain the least doubt but that Harper took a good title and could recover in the action of ejectment if the sale was complete. In reading the cases that discuss Orphans' Court sales we come across the word "sale" used in two different senses. There is a narrow sense in which the word sale is used which seems to mean that part of the transaction necessary to pass the title of the land, which is conducted by the administrator: and principally consists of offering the land for sale and the agreement of the price to be paid, but it takes this "sale" and the confirmation of the Orphans' Court and the execution and delivery of a deed before the title of the purchaser is complete. However the word "sale" is used in a broader sense which includes all of the transactions necessary to pass an absolute title: Dummy's Appeal, 45 Pa. 155. If the word "sale" is used in the narrow sense in the case stated, then Harper cannot recover as he has not yet completed his title: Strange v. Austin, 134 Pa. 96. If the word is used in the broader sense, then the purchaser's title is complete: Simmond's Estate, 19 Pa., 439. The question then is whether the word "sale" is used in the broader sense. And we think it is. A sale is "the transfer of the absolute title to property for a certain agreed price;" Story, December FORUM, 1906. "Made" implies that everything was done to make a complete sale.

Judgment is given for the plaintiff.

OPINION OF THE SUPREME COURT.

Had Wherry's lease been made by the decedent, the lien of Troop's debts would not have bound it. The lease was made by Troop's heirs, and hence subject to the lien of the debts. As the interest of the heirs, so also that of their lessee, was divested by the administrator's sale, and vested in Harper. Harper has not recognized the lease, by accepting rent falling due upon it, or otherwise. Hence he can recover the possession.

Judgment affirmed.

COMMONWEALTH VS. SEIBERT.

Receiving Stolen Goods—When Goods are not Stolen.

STATEMENT OF THE CASE.

Jones while stealing goods from a store for the purpose of selling them to the defendant, was apprehended and confessed. After the owner had recovered the goods, he directed Jones to sell them to the defendant Seibert, that the latter might be entrapped. Seibert bought the goods believing them to be stolen and was indicted for feloniously receiving property knowing it to be stolen.

Chase for the Commonwealth.

Barrett for the Defendant.

OPINION OF THE COURT.

The facts as brought out by the evidence, and which are undisputed are: That while Jones was stealing goods from a store for the purpose of selling them to the defendant, he was apprehended and confessed. After the owner had recovered the goods, he directed Jones to sell them to the defendant, Geibert, that the latter might be entrapped. Seibert, the defendant, bought the goods believing them to be stolen, and was indicted as a receiver of stolen goods knowing them to have been stolen.

The question involved is very plain, viz., were the acts of the defendant such as would bring him under the statute for this offence. Clearly we think not.

It is a fundamental principle of law that intent without the act is not punishable. No matter how depraved the mind, or how vicious the intent, if there be no execution or part execution thereof there can be no conviction. We believe that the case in dispute is wholly covered by the principal referred to. It is undisputed that an intent to receive stolen goods existed, but we are of opinion that no *actual* receiving of stolen goods took place, therefore eliminating the other essential necessary to form a criminal act. True, he received goods believing them to have been stolen, but the act of receiving stolen goods believing them to have been stolen, with the intent of receiving them as stolen goods; and the act of receiving goods that were not in fact stolen, but he believing them to have been stolen, receiving them as such; these are two very different matters. One may have the intent to desert to the enemy and flee towards his own troops believing them to be the hostile forces. Is he guilty of an offence? A robber sees a figure in a bed and fearing detection shoots with intent to kill, *and tae bullit pierced the head*—the figure was a corpse. Is he guilty of murder?

There is a very formidable array of authorities—though strangely a lack of them in this state, no opinion being expressed one way or the other—as to the mutation of stolen goods to ordinary goods having a lawful owner, when the rightful possessor exercises control and dominion over them after they have been stolen. And a subsequent disposal is one of lawful goods. In the case before us Jones undoubtedly became the lawful bailee. (See Reg. v. Dolan., Dears, 436. Reg. v. Handcock, 14 Cox C. C. 119 U. S. v. De Bafrre, 6 Biss. U. S. 358.)

In the light of these opinions and the universal concordance on the point of all the standard text writers, we can arrive at no other conclusion than, that the good were *not* stolen goods, having lost this characteristic when they again came into the control of the owner, and therefore, if the goods were not stolen goods when they reached the defendant, he had but the intent to carry out an act which under the circumstances was impossible to execute.

We therefore come to the conclusion that the Commonwealth has failed to make out its case, and the jury are hereby instructed to find a verdict of not guilty. FUNK, J.

OPINION OF THE SUPREME COURT.

"If any person" says the 109th section of the Act of March 31, 1860, 1 P. & L, 1319, "shall buy or receive any goods, chattels, moneys or securities, or any other matter or thing, the stealing of which is made larceny by any law of this Commonwealth, knowing the same to be stolen or feloniously taken, such person shall be guilty of felony," etc.

In order to constitute this crime it is necessary (a) that goods should be received (b) which are stolen, (c) with knowledge that they are stolen. The goods were received by Seibert. Were they at the time of receiving, stolen? Goods may be stolen, and recovered and stolen again. The reception from A of his own goods, which however had been previously stolen and recovered, could not be the crime intended. The goods received must be at the time of receiving, stolen; that is, out of the possession and control of the owner, in consequence of a larceny. They cease to *be* stolen when, having been stolen, they are regained by the owner, or by some other act, they have ceased to be the property of any one other than he, who now has them in control.

It is found that the owner had recovered the goods, after the theft. They were then no longer stolen. Jones had them as agent of the owner, for the sale of them, and Seibert bought them.

It is true that Seibert believed them to be stolen, and bought them as stolen goods. But to believe is not to know. Knowledge presupposes the corespondence between the conception and the fact; between the proposition which is mentally held, and the objective phenomenon. A man may believe what is really true, and not know that it is true; but he cannot know that which is not true, however complete his persuasion of its truth may be. It was the intention of the law-makers not to penalize the reception of goods mistakenly believed to be stolen, but to penalize the reception of goods in fact stolen, and known to be stolen.

The moral guilt of the defendant is as great, doubtless, as it would have been, had the goods been in fact stolen. But the statute does not punish moral guilt. The man who shoots at another with intent to kill him, but who fails to kill him, through the unexpected intervention of some agency, is morally guilty of murder, but he is legally guilty of no form of homicide.

Authority for the conclusion reached by the learned court below is hardly necessary. The phraseology of the act of 1860 is a sufficient vindication of it. But some courts have decided the question of the defendant's guilt negatively. Regina v. Schmidt, 10 Cox, C. C. 172; 1 Wharton, Crim. Law, p. 855; 1 McClain, Crim. Law, p. 711; 2 Russell, Crimes, p. 562.

BOOK REVIEWS.

LIQUOR LAWS OF PENNSYLVANIA, BY L. FLOYD HESS, LL. B. AND W. ALFRED VALENTINE, LL. B. REES WELSH & CO.

This is a very presentable book, in clear type and of good paper, well arranged and apparently complete. A former work by the same authors has demonstrated their capacity to produce a reliable and exact legal treatise. The reputation thus born will suffer no diminution by the examination of the present work. Part 1 is devoted to retail licenses; part 2 to licenses of wholesalers, brewers, bottlers, etc.; part 3 to transfers; part 4 to revocation; part 5 to appeal and mandamus; part 6 to criminal and penal procedure; part 7 to civil remedies, and part 8 to contractual liabilities and intoxication. A complete table of all the acts cited, and a very full index add materially to the value of the book. Forms for all imaginable proceedings are liberally supplied. The book needs to be but cursorily examined to command for itself the cordial approbation of lawyers. We can unstintedly recommend it.

INDEX-DIGEST OF THE INTERSTATE COMMERCE ACTS, THE SHERMAN ANTI-TRUST ACT AND KINDRED LAWS, BY CHARLES S. HAMLIN, ESQ. LITTLE, BROWN & CO., BOSTON, MASS.

This book of 480 pages must prove of great value for all who need to know the contents of the various statutes indicated. Its object cannot be better stated than in the language of the author. "It is intended to furnish an index of the leading words and phrases used in the Acts relating to the regulation of commerce, a concise digest of the text relating to the respective words and phrases, and also a comparison of their uses in other parts of the same and the other acts". The acts in question are printed with marginal annotations. The lines are numbered so that anything therein desired can be found with the utmost expedition.

The acts are grouped into distinct series, and each series has its own separate digest. There are therefore twelve separate digests. The separation of the statutes into groups, makes the finding of any desired topic therein the quicker and easier.

The type is clear, the paper attractive, and the book is bound in law buckram. It may be safely recommended to the notice of all that are interested in questions of carriers, transportation, trusts and commerce.